Constitutional Standards of Review for Medical Malpractice Mediation Panels

MICHAEL H. MOORE

I. INTRODUCTION

During the mid-1970s there were dramatic increases in both the number and severity of medical malpractice claims. The courts were inundated with these claims, and costs such as medical malpractice insurance skyrocketed. These factors resulted in a wide variety of legislation aimed at halting this medical malpractice crisis.[1]

The most common legislative proposals to alleviate the medical malpractice crisis included limiting the amount of the plaintiff's recovery or the amount of the defendant's liability, reducing the period of time within which a medical malpractice suit could be filed, abrogating the collateral source rule, establishing a mediation screening panel, and establishing mandatory or voluntary arbitration hearings.[2]

The establishment of mediation panels and arbitration hearings constituted the major focus of reform. Through these procedures the state legislatures expected to reduce the costs of medical care and the volume of litigation by encouraging prompt and early settlement of meritorious claims.[3]

At least twenty-seven states have passed statutory provisions that establish mediation or arbitration panels to review malpractice claims.[4] Although some of the statutes vary in structure,[5] they all raise two serious constitutional issues: a possible denial of the right to trial by jury, and equal protection under the laws. The purpose of this Note is to examine the continued viability of the legislative alternatives to medical malpractice litigation in light of the constitutional issues raised above.

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1. *See generally* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); AMERICAN MEDICAL ASSOCIATION, SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, *PROFESSIONAL LIABILITY IN THE '80S: REPORT 2*, at 4 (Nov. 1984) ("A crisis occurs when a substantial number of physicians feel they either can't get or can't afford the malpractice insurance.").

2. Redish, *supra* note 1, at 761.

3. Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682, 683 (1981).

4. Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322, 324 (1977).

5. *See* Jones, *Medical Malpractice Litigation: Alternatives for Pennsylvania*, 19 DUKE L.J. 407, 408 n.2 (1981). *Compare* N.H. REV. STAT. ANN. § 519-A:2 (1974) (the plaintiff is the only party having the option to submit to the procedure) *with* VA. CODE § 8.01-581.2 (1984) (submission by either party authorized) *and* OHIO REV. CODE ANN. § 2711.21(A) (Page 1981) (mandatory submission).

II. MEDIATION AND ARBITRATION PANELS

Mediation and arbitration panels are significantly different. Mediation panels are applied at an early stage in medical malpractice actions to screen claims. The purpose of mediation panels is to encourage settlement of meritorious claims, and to eliminate spurious claims.[6] The majority of mediation panel legislation mandates that the parties submit their claims to the panel.[7] The panel usually consists of a member of the legal profession,[8] at least one member of the medical profession,[9] and a nonlegal, nonmedical, neutral person.[10] Although the proceedings are considered adversarial in nature, strict adherence to the rules of evidence and procedure is not required.[11]

A mediation panel's findings are not legally binding, and the parties can proceed with a trial de novo.[12] However, most states permit the panel's findings to be admitted at trial. The question then arises whether admitting the panel's findings might unduly influence the jury's evaluation.[13] The question of admissibility poses a Catch-22 situation. If the panel's findings are admitted at trial, the panel loses its mediative purpose and merely becomes an added burden to the litigation process. But if the findings are not admissible, then the parties have little or no deterrence to proceed to a trial de novo, and the panel becomes a wasteful and costly rehearsal.[14] To the extent that mediation panels merely supplement the litigation process, the added cost and delay may effectively deter the litigation of meritorious claims.[15] The added burden of mediation screening falls most heavily on the plaintiffs' ability to assert their claims, thus constitutional attacks focus on the cost, efficiency, and fairness of the particular state's

6. Note, *supra* note 4.

7 Note, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis To Safeguard Individual Liberties*, 18 HARV J. ON LEGIS 143, 150 (1981).

8. Note, *supra* note 4, at 351.

9. *See, e.g.*, N.Y. JUD. LAW §148-a(3)(b) (McKinney 1983 & Supp. 1985).

10. Note, *supra* note 4, at 351.

11. *E.g.*, ARIZ. REV. STAT. ANN. § 12-567(D) (1982 & Supp. 1984).

12. Sakayan, *supra* note 3, at 686. Maryland is the only state in which the panel's findings are binding and converted into judgments. However, the Maryland plan is a hybrid arbitration/mediation panel. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01,-2A-06 (1984).

13. *See* Note, *supra* note 4, at 334. *But see* Beatty v. Akron City Hospital, 67 Ohio St. 2d 483, 490, 424 N.E.2d 586, 591 (1981) (the net effect of the panel's decision is to provide the jury with an additional expert opinion by way of panel decision, so that the jury still remains final arbitrator of all facts).

14. Note, *supra* note 7 at 151.

15. There are no reported studies available demonstrating that mediation panels actually deter nonmeritorious claims. In fact, the scant evidence available indicates that the filing of meritorious claims has been deterred. *See* Margolick, *Mediation Isn't Cure for Patients Claims*, 2 NAT'L L.J. 1, 34 (1980).

process.[16]

The essential feature distinguishing arbitration panels from mediation panels is the finality of the arbitration panel's findings. Although binding arbitration may either be mandatory or voluntary, no state has mandated the use of binding arbitration in medical malpractice cases. However, several states have enacted legislation expressly authorizing or regulating voluntary binding arbitration of such cases.[17] These arbitration awards are final and subject to appeal only on limited grounds.[18]

The majority of states that have adopted arbitration panels have made their use mandatory but not binding; an appeal or trial de novo is permitted.[19] Once the arbitration hearing has ended and the panel has made its ruling, some states require the plaintiff to post a substantial bond before proceeding to trial.[20] This requirement may prevent meritorious claims from going forward and thereby deny the plaintiff's constitutional right to a trial by jury.

III. CONSTITUTIONAL CONSIDERATIONS

A. Trial by Jury

The United States Supreme Court has never incorporated the seventh amendment right to a civil jury trial into the due process clause of the fourteenth amendment; thus, whatever constitutional right to a civil jury trial exists in state courts must originate in that state's constitution.[21] Every state, with the exception of Colorado and Louisiana, has constitutional provisions for a right to a jury trial in civil actions.[22]

Claims that the right to a jury trial is violated because of the use of mediation or arbitration hearings appear to have no basis.

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16. *See* Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (holding unconstitutional specific provisions of the Pennsylvania Health Care Services Malpractice Act because they resulted in oppressive delays and impermissibly infringed upon the right to jury trial).

17. *See* MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (West Supp. 1985).

18. Under the Michigan Malpractice Arbitration Act (MMAA), an appeal from an arbitration award may be taken only in accordance with the procedure and for the grounds permitted under the general arbitration law and applicable court rule. MICH. COMP. LAWS ANN. § 600.5057 (West Supp. 1985).

19. *See* OHIO REV. CODE ANN. § 2711.21 (Page 1981). Note, however, that § 2711.21(E) provides that any person may enter into an agreement to arbitrate or to be bound by the decision of the arbitrators.

20. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-567(J) (1982 & Supp. 1984); MASS. ANN. LAWS ch. 231, § 60B (Michie-Law. Co-op. Supp. 1985).

21. Redish, *supra* note 1, at 792 n.203.

22. Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 303, 326 n.134 (1976).

Except for voluntary binding arbitration,[23] mandatory mediation or arbitration is not binding, and either party may seek a trial de novo. State legislatures have diminished the right to a jury trial in two ways. Plaintiffs are statutorily required to submit their claims to panels before proceeding to trial, and the admissibility of the panel's findings and decisions into evidence at trial usurps the jury's function.

B. *Prerequisite to a Jury Trial*

The Illinois Supreme Court, in *Wright v. Central DuPage Hospital Association*[24] held that the Illinois statute requiring a hearing by a mediation panel prior to trial infringed upon the constitutionally protected right to trial by jury. Arguably, this portion of the ruling is merely dicta because the court had already held the statute unconstitutional based upon the separation of powers requirement before deciding the right to jury issue.[25] The court then noted "[B]ecause we have held that these statutes providing for medical review panels are unconstitutional, it follows that the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury. "[26]

Wright does not stand for the proposition that a mandatory prerequisite to a jury trial is an impermissible burden on that right. The *Wright* court limited its holding to situations in which the composition of the panel is unconstitutional and added "we do not imply that a valid pretrial panel procedure cannot be devised."[27]

In *Carter v. Sparkman*[28] the Florida Supreme Court rejected

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23. Voluntary binding arbitration, when there is a written agreement to be bound by panel findings, does not violate the right to jury trial since that right can be waived by the written agreement. *See* Redish, *supra* note 1, at 792 n.204. *See also* S.D. CODIFIED LAWS ANN. § 21-25B-3 (1979) providing that the plaintiff be made aware in the arbitration agreement that he has given up his jury trial right. California requires that a contract to arbitrate medical malpractice disputes provide in at least 10-point bold red type that "you are giving up your right to a jury or court trial." CAL. CIV. PROC. CODE § 1295(b) (West 1982).

24. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

25. *Id.* at 322, 347 N.E.2d at 739. The court concluded that the statute was unconstitutional based upon the finding that one of the three members of the panel, a judge, was not devoting full time to his judicial duties and that the nonjudicial members, a private physician and an attorney, were performing judicial functions. This conduct was in derogation of article VI, section 1, of the Illinois Constitution which provides: "[T]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts," and article VI, section 9 which provides that the circuit court "shall have 'original jurisdiction' of all justiciable matters." ILL. CONST. art. VI, §§ 1, 9; *see also* Redish, *supra* note 1, at 794 n.219 (1977).

26. 63 Ill. 2d 313, 324, 347 N.E.2d 736, 741 (1976).

27 *Id.*

28. 335 So. 2d 802 (Fla. 1976), *rev'g* Solomon v. Memorial Hosp., 43 Fla. Supp. 105 (Cir. Ct. 1975), *cert. denied*, 429 U.S. 1041 (1977). Other cases reaching the same result include Prendergast v. Nelson, 199 Neb. 97 256 N.W.2d 657 (1977) and Comiskey v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976).

the conclusion reached in *Wright* and reversed the lower court's holding that the Florida statute violated the right to "timely access to the courts."[29] Recognizing that the pretrial mediation panel puts "persons who seek to bring malpractice lawsuits . to the expense of two full trials of their claim . . ",[30] the court understood that "reasonable restrictions prescribed by law" may be imposed on the constitutional guarantee of access.[31] The Florida Supreme Court concluded that "[e]ven though the prelitigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law."[32]

Four years later, however, the Florida Supreme Court did an about-face in *Aldana v. Holub*.[33] Although the court avoided explicitly overruling *Carter*, it held that the medical malpractice statute had proved "unworkable and inequitable in practical operation," thereby denying due process and the right to a jury trial.[34] The court found the entire Florida Medical Mediation Act unconstitutional.[35]

Subsequently, the same sequence of events occurred in Pennsylvania. The Pennsylvania Supreme Court initially refused to declare unconstitutional a statutory requirement that malpractice litigants submit their claims to an arbitration panel.[36] After two more years of experience with that procedure, the court, in *Mattos v. Thompson*,[37] held that the lengthy delays in the arbitration process denied malpractice litigants their constitutional right to trial by jury, and declared the statute unconstitutional.[38] The *Mattos* court evaluated the poor statistical record of the arbitration panels.[38] The court determined that the legislative scheme grant-

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29. Solomon v. Memorial Hosp., 43 Fla. Supp. 105, 107 (Cir. Ct. 1975). This is the same issue as the right to trial by jury. Note, *supra* note 4, at 329 n.52.

30. 355 So. 2d at 807 (England, J., concurring).

31. *Id.* at 805.

32. *Id.* at 806.

33. 381 So. 2d 231 (Fla. 1980).

34. *Id.* at 237. *See infra* notes 147-52 and accompanying text.

35. The court stated:

> [T]his opinion will have prospective application only. In any case where the written decision of the medical mediation panel has been filed on or before the date this decision is filed (Feb. 28, 1980), a party may introduce that decision in evidence. In all other cases, medical mediation proceedings are hereby terminated and declared void as of the above filing date.

Aldana v. Holub, 381 So. 2d 231, 238 (Fla. 1980).

36. Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978).

37. 491 Pa. 385, 421 A.2d 190 (1980); *accord* Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291 (1984).

38. The court rendered this statistical analysis:

> The findings made by the Commonwealth Court indicate that the arbitration

ing the panels "original exclusive jurisdiction" could not achieve its stated purpose of providing prompt adjudication of claims, and therefore impermissibly curtailed a plaintiff's right to a jury trial.[39]

The Massachusetts Supreme Judicial Court in *Paro v. Longwood Hospital*[40] held that the Massachusetts Medical Malpractice Act's requirement that the plaintiff post a two thousand dollar bond as a prerequisite to a trial violated neither the right to a jury trial nor free access to the courts. The Act allowed the trial judge to reduce the bond for an indigent plaintiff, thus, the court found no constitutional violation.[41] The court further noted that Article 15 of the Massachusetts Declaration of Rights states that the right to a jury trial is not absolute. It "may be regulated as to the mode in which the right shall be exercised so long as such regulation does not impair the substance of the right."[42]

The Arizona Supreme Court has viewed the bond prerequisite for medical malpractice litigants in a different light. In *Eastern v. Broomfield*,[43] although holding that the mandatory mediation panel was constitutional, the court did strike down the Act's requirement that a plaintiff post a two thousand dollar bond as a

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> panels provided for under the Act are incapable of providing the 'prompt determination and adjudication' of medical malpractice claims which was the goal of the Act. Nor has the arbitration system improved within the last year. Papers filed with this Court included a statistical analysis of the health care panels up to May 31, 1980. These documents reveal that as of May 31, 1980, a total of 3,452 cases had been filed with the Administrator and that only 936 of these cases had been resolved, settled or terminated. This means that 73 per cent [sic] of the cases filed with the Administrator have not been resolved. Even worse, six of the original 48 cases filed in 1976 remain unresolved, despite the passage of four years. No extraordinary circumstances have been offered to explain this intolerable delay. Furthermore, as of May 31, 1980, 38 per cent [sic] of the claims filed in 1977, 65 per cent [sic] of the claims filed in 1978, and 85 per cent [sic] of the claims filed in 1979 remain unresolved. Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system. Most importantly, these situations amply demonstrate that 'the legislative scheme is incapable of achieving its stated purpose.

Mattos v. Thompson, 491 Pa. 385, 395-96, 421 A.2d 190, 195-96 (1980) (footnote and citations omitted); *see also* Heller v. Frankston, 504 Pa. 528, 475 A.2d 1291, 1295 (1984).

39. Even before the *Mattos* decision it was recognized that the Pennsylvania statute was a failure. *See* Edelson v. Soricelli, 610 F.2d 131, 136 (3d Cir. 1979) (even though Pennsylvania statute requiring arbitration of medical malpractice claims is "a resounding flop" federal court still applies state statute).

40. 373 Mass. 645, 369 N.E.2d 985 (1977).

41. *Id.* at 652-53, 369 N.E.2d at 990.

42. *Id.* at 654, 369 N.E.2d at 991; *see also* Orasz v. Colonial Tavern, Inc., 365 Mass. 131, 134, 310 N.E.2d 311, 313 (1974) (quoting H. K. Webster Co. v. Mann, 269 Mass. 381, 385, 169 N.E. 151, 153 (1929)); Ortwein v. Schwab, 410 U.S. 656 (1973) (state can constitutionally restrict recipient's court access by requiring filing fee for appeal from adverse welfare decision); United States v. Kras, 409 U.S. 434 (1973) (a required payment of filing fee prior to filing bankruptcy was upheld).

43. 116 Ariz. 576, 570 P.2d 744 (1977).

prerequisite to appearing in court.[44] The court found that the medical malpractice litigant, because of the bond requirement, was not "afforded an equal opportunity [for access] to the courts."[45]

Cases such as those in Arizona,[46] Pennsylvania[47] and Florida[48] reflect the awareness that, although the acts are not unconstitutional on their face, their operative effects make them unconstitutional as applied. However, merely establishing a mediation panel as a prerequisite to a jury trial cannot be said to deny the right to proceed to a jury trial.[49]

Currently, other procedures are prerequisites to a jury trial, but are nonetheless constitutional. Under Rule 53 of the Federal Rules of Civil Procedure, litigants may use masters and special referees to hear and decide certain issues. Courts have found this to be constitutional and not violative of the right to a jury trial.[50] One court has likened the medical malpractice mediation panel to a mandatory pretrial conference.[51]

If the mediation/arbitration process is looked at as a device that delays the trial process while meeting all other constitutional tests,[52] a mandatory prerequisite to a jury trial is not an unconstitutional infringement upon that right.

C. *Admissibility into Evidence*

In many states, the panel's findings and decisions are admissi-

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44. ARIZ. REV. STAT. ANN § 12-567(J) (1982 & Supp. 1984); Eastern v. Broomfield, 116 Ariz. 576, 585-86, 570 P.2d 744, 753-54 (1970). Subsequently, the bond requirement was omitted from the statute. *See generally* ARIZ. REV. STAT. ANN. § 12-567(I) (West 1982 & Supp. 1984). *But see* Fahtimen v. Superior Court, 130 Ariz. 513, 637 P.2d 723 (1981), *cert. denied*, 454 U.S. 1152 (1982) (holding that there is no constitutional requirement to waive filing fees in a civil case for indigents except when the suit involves a fundamental right). Note again that this analysis is based on due process but is just as applicable in a right to a jury trial analysis. *See supra* note 42.

45. Eastern v. Broomfield, 116 Ariz. 576, 585-86, 570 P.2d 744, 753. Note again the court's mixture of equal protection, due process and right to jury trial analysis.

46. *See supra* notes 43-45 and accompanying text.

47. *See supra* notes 36-39 and accompanying text.

48. *See supra* notes 28-35 and accompanying text.

49. *See, e.g.*, Comment, *Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607 629 (1978).

50. Irving Trust Co. v. Trust Co., 75 F.2d 280, 282 (2d Cir. 1935); *see also* Note, *supra* note 4, at 330.

51. Carter v. Sparkman, 335 So. 2d 802, 807 (Fla. 1976) (England, J., concurring), *cert. denied*, 429 U.S. 104 (1977).

52. A right to a jury trial must also be satisfied in the many states that allow the panel's findings or decision to be admitted into court as evidence. *See infra* notes 53-68 and accompanying text. The panel procedure must also pass the equal protection test as well as other constitutional tests that are beyond the scope of this Note. *See infra* notes 71-130 and accompanying text.

ble into evidence at trial.[53] With one exception,[54] these states provide that the findings and decisions of the panel are not binding. The influence that these decisions have upon the jury may thereby infringe upon the parties' right to a trial by an impartial jury.[55]

An Ohio trial court agreed with this assessment in *Simon v. St. Elizabeth Medical Center*,[56] and held Ohio's medical malpractice arbitration system unconstitutional. Under Ohio Revised Code section 2711.21, the arbitrators' decision and testimony can be introduced into evidence. The court stated that this procedure "effectively and substantially reduces a party's ability to prove his case, because that party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts."[57]

The trial court also stated that the compulsory arbitration constricted one's right to a jury trial.[58] The court concluded that "[w]hile the right to proceed to a jury trial still exists under R.C. Section 2711.21, it is clearly not a free and unfettered right as was certainly intended by the framers of Article I, Section 5 of the Ohio Constitution."[59]

In 1981 the Ohio Supreme Court ruled contrary to the *Simon* principles. In *Beatty v. Akron City Hospital*[60] the court held, without referring to *Simon*, that Ohio Revised Code section 2711.21 is compatible with the right to a fair and impartial jury trial.[61] The court was not persuaded by the argument that the

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53. *See* Note, *supra* note 4, at 352 for a listing of these states.

54. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984) provides that the decision of the panel is presumptively correct, but not binding.

55. *See, e.g.*, Note, *Ohio's RX for the Medical Malpractice Crisis: The Patient Pays*, 45 U. CIN L. REV. 90, 102 (1976) ("[A] jury may give undue weight to the findings and testimony of the panel."); Comment, *Recent Medical Malpractice Legislation A First Checkup*, 50 TUL. L. REV. 655, 681 (1976) ("[T]he prejudicial effect of an admissible, adverse panel report could be virtually impossible to overcome ").

56. 3 Ohio Op. 3d 164, 172, 355 N.E.2d 903, 911 (Ct. C.P. 1976). The court also held that OHIO REV. CODE ANN. §§ 2307 42, 2307 43 and 2711.21 violated article I, section 2 of the Ohio Constitution as well as the fourteenth amendment of the federal Constitution with respect to equal protection and were, therefore, unconstitutional, void, and of no effect. *Id.* at 172, 335 N.E.2d at 912. Note, however, that the reference to OHIO REV. CODE ANN. § 2307 43 was dicta. *Id.* at 172 n.3, 355 N.E.2d at 912 n.4.

57 *Id.* at 168, 355 N.E.2d at 908.

58. *Id.*

59. *Id.* The court did not invalidate the then newly enacted Montgomery County Court of Common Pleas rule setting up a compulsory arbitration procedure for civil cases not exceeding ten thousand dollars. Because the local procedure did not permit the arbitrators to testify or have their decision introduced as evidence, the court said that the local procedure "would seem to be constitutionally valid." *Id.* at 169, 355 N.E.2d at 908.

60. 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981).

61. *Id.* at 483, 424 N.E.2d at 587 (syllabus by the court). The court also held that OHIO

jury would be unduly influenced by the panel's decision. The court concluded that submission of the panel's decision only provided additional evidence to be considered by the jury. "[T]he net effect of the panel's decision is to provide the jury with an additional expert opinion by way of panel decision The jury should still remain the final arbiter of all the factual issues presented."[62]

Beatty follows the view expressed by several states in earlier court decisions. In *Prendergast v. Nelson*[63] the Supreme Court of Nebraska rejected both the defendant's implication that a jury could not or would not objectively evaluate a medical review panel's recommendation and the trial court's instructions regarding the weight to be given it.[64] An important distinction must be made between *Prendergast* and *Beatty* The Nebraska review panel in *Prendergast* could provide only an opinion, whereas the Ohio arbitration panel in *Beatty* had the authority to dispose of a claim. The additional authority accorded under the Ohio procedure may heighten the importance of the panel's decision or findings, possibly enough to sway a jury.

The New York Appellate Court, in *Comiskey v. Arlen*,[65] ruled that the admissibility of the panel's findings did not usurp the jury's function. The court opined that the jury is the ultimate arbiter of factual questions raised at trial. The panel's recommendation is like an expert opinion, and the jury is to evaluate it as such.[66]

Assuming the validity of the concerns expressed by the *Simon* court, the panel's decision alone will not satisfy the burden of proof,[67] and the jury still makes the final determination. As one New York trial court stated, "Historically, jurors for the most part have proven their independence. They guard their roles with a unique jealousy. They accept with obvious pride the admonitions of the trial court that they are 'sole judges of the facts.' "[68]

REV. CODE ANN. § 2711.21 is rationally related to a legitimate governmental interest, and does not conflict with the right of equal protection guaranteed by article I, section 2 of the Ohio Constitution. *Id.*

62. *Id.* at 490, 424 N.E.2d at 591.

63. 199 Neb. 97, 256 N.W.2d 657 (1977).

64. *Id.* at 109, 256 N.W.2d at 666.

65. 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976), *aff'd on other grounds*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977).

66. *Id.* at 309, 390 N.Y.S.2d at 126.

67. *But see supra* note 56. *See also* Note, *supra* note 4, at 334.

68. Halpern v. Gozan, 85 Misc. 2d 753, 759, 381 N.Y.S.2d 744, 748 (S. Ct. 1976).

IV. EQUAL PROTECTION

A. *Judicial and Constitutional Tests*

Critics challenge these legislative enactments on equal protection grounds because the mandatory medical malpractice panels single out medical malpractice litigants for differential treatment. Medical malpractice litigants claim discrimination because they are subject to rules and procedures that do not extend to other tort litigants.[69] Only unjustified discrimination violates the equal protection clause of the Constitution.[70] The court must first define the proper test of scrutiny before determining if the discrimination claim is justified.

Traditionally, one of two tests determines whether discrimination results in a denial of equal protection: the "strict scrutiny" test[71] or the "rational basis" test.[72] The strict scrutiny test is only used when a suspect classification[73] is involved, or when the statute infringes upon one's "fundamental rights."[74] Once a fundamental right or suspect classification is shown to exist, the state assumes the burden of proving the statute's constitutionality.[75] The state must show that the statute satisfies a compelling state interest and that no other workable alternative exists.[76]

The rational basis test is used when no suspect classification or fundamental right exists. The court imposes a minimal level of scrutiny under this test. Unequal treatment of classes of persons is valid only if a reasonable basis exists between the classification

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69. The equal protection clause states: "No state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

70. Dandridge v. Williams, 397 U.S. 471, 485, *reh'g denied*, 398 U.S. 914 (1970).

71. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

72. *E.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

73. Examples of suspect classifications would be race, alienage, national origin, or illegitimacy. Note, *supra* note 4, at 337 n.113.

74. The "fundamental rights" are found in the first eight amendments to the Constitution (The Bill of Rights) and, in addition, encompass those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The ninth amendment of the Constitution guarantees these rights: "The enumeration in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people." U.S. CONST. amend. IX, *quoted in* Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring). To determine what is a fundamental right, "[t]he inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lies at the base of all our civil and political institutions" ' " Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

75. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972); Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 491-92, 424 N.E.2d 586, 592 (1981).

76. Roe v. Wade, 410 U.S. 113, 155, *reh'g denied*, 410 U.S. 959 (1973); Comment, *Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607 615 (1979).

and the objective of the statute.[77] The statute is usually found constitutional when the minimal level of scrutiny is imposed.[78]

Recently, the United States Supreme Court has applied an intermediate standard of review that is more vigorous than the rational basis test but less demanding than strict scrutiny.[79] This "substantial relationship" test has been essentially limited to semi-suspect classifications, such as gender-based discriminatory statutes.[80] At least three states have used this test but nothing indicates that any other state will apply this intermediate standard of review to determine the constitutionality of their medical malpractice statutes.[81] This Note will focus only upon the two traditional tests: strict scrutiny and rational basis.

B. *Testing the Statutory Basis*

In *American Bank and Trust Co. v. Community Hospital*,[82] the plaintiff challenged the constitutionality of a provision of the California Medical Injury Compensation Reform Act of 1975 (MICRA),[83] codified as section 667 7 of the California Code of Civil Procedure. Although the constitutional challenge did not concern the establishment of a medical malpractice arbitration or mediation panel, the court's analysis is analogous to that used in determining the constitutionality of such panels. Section 667 7 provides that when a plaintiff in a medical malpractice case has sustained "future damages" of fifty thousand dollars or more, compensation for those future damages is to be paid periodically rather than in a lump sum.

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77. McGowan v. Maryland, 366 U.S. 420, 425-26 (1964); Allied Stores v. Bowers, 358 U.S. 522, 530 (1959); Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 491-92, 424 N.E.2d 586, 592 (1981).

78. *But see* Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (holding that because there was no medical malpractice crisis to justify enactment of such legislation, the statute creating a system for processing of medical malpractice complaints violated the equal protection of the laws).

79. Califano v. Goldfarb, 430 U.S. 199 (1977); Comment, *Constitutional Challenges To Medical Malpractice Review Boards*, 46 TENN. L. REV. 607, 615 (1979).

80. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259, 265 (1979) (illegitimacy); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (gender).

81. Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). *Carson* held the entire state statute unconstitutional. The court justified using the "substantial relationship" test by stating, "we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires." Carson v. Maurer, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980).

82. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

83. CAL. CIV. PROC. CODE § 667.7 (West 1980).

In *American Bank*, the plaintiff received a jury verdict for almost two hundred thousand dollars.[84] The defendant moved for an order of periodic payments pursuant to section 667 7 The lower court concluded that this provision of the Act denied equal protection by granting a privilege to health care defendants that was not afforded to other defendants. The court concluded that by "tax[ing] an impermissible special class [of plaintiffs] for the purported benefits to be enjoyed by the general public," the legislature acted with sufficient "arbitrar[iness] as to deny equal protection."[85]

On appeal, the California Supreme Court found that applying section 667 7 to medical malpractice actions did not violate equal protection principles.[86] The court, using the rational basis test,[87] found that the periodic payment provisions were rationally related to the objective of reducing insurance costs.[88] Since the legislature's decision to reduce insurance costs in the medical malpractice area had a rational basis, there was no equal protection violation.[89] But this last statement merely restates the question. The court did not disclose how they determined that the legislature had a rational basis for reducing insurance costs, but simply declared that the legislature was responding to a medical malpractice insurance "crisis."[90] When confronted with the question of whether a crisis actually existed, the court side-stepped the issue by saying that "[i]t is not the judiciary's function to reweigh the 'legislative facts' underlying a legislative enactment."[91] In effect, the court assumed that a rational basis for the discriminatory treatment existed.

The Supreme Court of Rhode Island, in *Boucher v. Sayeed*,[92] was not willing to make the general assumption made in *American*

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84. American Bank and Trust Co. v. Community Hosp., 36 Cal. 3d 359, 365, 683 P.2d 670, 673, 204 Cal. Rptr. 671, 674 (1984).

85. American Bank and Trust v. Community Hosp., 104 Cal. App. 3d 219 (opinion deleted), 163 Cal. Rptr. 513, 521 (1980).

86. American Bank and Trust Co. v. Community Hosp., 36 Cal. 3d 359, 371, 683 P.2d 670, 679, 204 Cal. Rptr. 671, 680 (1984).

87 The court stated: "Although several amici urge the court to apply a stricter standard of review, the governing authorities—both federal and state—establish that the traditional rational [basis] standard is applicable here." *Id.* at 373 n.12, 683 P.2d at 679 n.12, 204 Cal. Rptr. at 680 n.12.

88. *Id.* at 372-73, 683 P.2d at 678, 204 Cal. Rptr. at 679.

89. *Id.* at 373, 683 P.2d at 679, 204 Cal. Rptr. at 680.

90. *Id.* at 371, 683 P.2d at 677 204 Cal. Rptr. at 678.

91. *Id.* at 372, 683 P.2d at 678, 204 Cal. Rptr. at 679.

92. 459 A.2d 87 (R.I. 1983).

Bank. The *Boucher* court employed the rational basis test[93] to determine that mandatory mediation panels enacted by the Medical Malpractice Reform Act of 1976[94] violated the constitutional guarantee of equal protection. The court also took judicial notice in assessing that a malpractice crisis no longer existed.[95]

> Although at the time of its creation the Rhode Island medical . . . panel may have been a rational response to the malpractice 'crisis', the present need for such a procedure . . . no longer exist[s] . . . . [T]he state malpractice statute [does] not withstand an equal protection challenge even under the rational basis test because the panel system . . . no longer serve[s] a legitimate governmental function.[96]

While challenged legislation enjoys a presumption of constitutionality,[97] the *Boucher* court found that the plaintiffs successfully rebutted the legislative presumption of constitutionality. The plaintiffs demonstrated that the statute lacked sufficient rational basis to justify the differential treatment it received.[98]

Rhode Island is one of few states to successfully challenge its state legislature's conclusion that a medical malpractice crisis exists, a conclusion that provides a rational basis for statutory enactments. In *Wisconsin ex. rel. Strykowski v. Wilkie*,[99] the plaintiff argued that the court should subject Wisconsin's Health Care Liability and Patients Compensation Act[100] to the strict scrutiny test.[101] The court used the rational basis test, however, since neither a fundamental right nor a suspect class was involved,[102] and concluded that the legislature acted upon a rational basis.[103]

The plaintiff in *Wilkie* rebuked the rational basis argument,

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93. The court found that the classifications created by the statute neither infringed upon fundamental rights nor employed suspect classifications. Boucher v. Sayeed, 459 A.2d 87, 91-92 (R.I. 1983). Most courts reviewing malpractice reform acts have reached similar conclusions. *See, e.g.*, Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981). This finding precludes the use of the strict scrutiny test. *But see* Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976) in which the court never expressly stated the applicable standard for judicial scrutiny but the reasoning and results suggest the "strict scrutiny" test was applied.

94. R.I. GEN. LAWS §§ 10-19-1 to 10-19-5 (Supp. 1984).

95. Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983).

96. *Id.* (quoting Note, *The Rhode Island Medical Liability Mediation Panels: Constitutional Challenges and Impact on Informed Consent*, 15 SUFFOLK U.L. REV. 563, 578-79 (1981)).

97. Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983).

98. *Id.* at 94.

99. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

100. WIS. STAT. ANN. §§ 655.02-.21 (West 1980 & Supp. 1985).

101. Wisconsin *ex. rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 506, 261 N.W.2d 434, 441 (1978).

102. *Id.* at 507, 261 N.W.2d at 442.

103. *Id.* at 508, 261 N.W.2d at 442.

contending that no medical malpractice crisis existed.[104] The court based its decision on whether the legislature acted upon a reasonable basis that *might* have existed.[105] Many courts defer to a legislature's conclusion that a medical malpractice crisis exists.[106]

C. *Testing Unequal Procedures for Tort Litigants*

Mandatory mediation and arbitration panels were consciously designed to handle only medical malpractice claims and not other tort or liability claims. The question arises whether medical malpractice claimants are subject to discrimination prohibited under the equal protection guarantee.

An Ohio trial court faced this question in *Simon v. St. Elizabeth Medical Center.*[107] As discussed above, the court concluded that the compulsory arbitration requirements of Ohio Revised Code section 2711.21 violate the equal protection clause by benefiting medical malpractice defendants with pretrial panel hearings unavailable to defendants in other tort cases.[108] This "benefit" translated into additional burdens of time and expense to plaintiffs, beyond those imposed in nonmedical claims.

The *Simon* court did not specify whether it utilized the strict scrutiny or the rational basis test in determining the constitutionality of section 2711.21. The court simply agreed with the analysis used in *Graley v. Satayatham,*[109] another Ohio trial court case. The *Graley* court ruled that other provisions of the Medical Malpractice Act[110] violated equal protection rights because they also conferred benefits on medical malpractice defendants that were unavailable to other tort defendants.[111] The court never determined whether the case involved a fundamental right or a suspect classification, but apparently used the strict scrutiny test

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104. *Id.* at 507, 261 N.W.2d at 442.

105. *Id.* at 508, 261 N.W.2d at 442 (emphasis added); *see also* American Bank and Trust Co. v. Community Hosp., 36 Cal. 3d 359, 372, 683 P.2d 670, 678, 204 Cal. Rptr. 671, 679 ("It is not the judiciary's function, however, to reweigh the 'legislative facts' underlying a legislative enactment.").

106. *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillo v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 A.D. 304, 390 N.Y.S.2d 122 (1976); Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981). *But see* Aldana v. Holub, 381 So. 2d 231 (Fla. 1980).

107. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976); *see supra* notes 58-61 and accompanying text.

108. *Id.* at 167, 355 N.E.2d at 906.

109. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Ct. C.P. 1976).

110. OHIO REV. CODE ANN. §§ 2305.27, 2307.42 (Page 1981).

111. Grayley v. Satayatham, 74 Ohio Op. 2d 316, 319, 343 N.E.2d 832, 836 (Ct. C.P. 1976).

to find that no compelling governmental interest satisfied the separate and unequal treatment conferred by the Medical Malpractice Act.[112] The *Simon* court, by relying on the *Graley* analysis, implicitly adopted the strict scrutiny test. If this is an accurate assessment, *Simon* and *Graley* are in a distinct minority of cases finding the strict scrutiny test appropriate to determine the constitutionality of medical malpractice arbitration.[113]

The Ohio Supreme Court did not adopt *Graley* or *Simon*. In *Beatty v. Akron City Hospital*[114] the court rejected the strict scrutiny test because no fundamental right existed since the court earlier had determined that the Medical Malpractice Act did not deny the fundamental right to a jury trial.[115] Further, the court found no establishment of a suspect classification.[116] The *Beatty* court determined that the rational basis test applied,[117] and that the mandatory medical arbitration panel[118] represented a rational response by the legislature to the medical malpractice crisis.

The panel provision was thereby constitutional.[119] Litigants presented a different equal protection attack to the Massachusetts Supreme Court. In *Paro v. Longwood Hospital*,[120] the court faced the problem of unequal treatment between parties to medical malpractice claims. The Massachusetts statute provided that if the mediation screening panel's findings were adverse to the plaintiff, the plaintiff had to post a two thousand dollar bond before proceeding to trial.[121] However, if the findings showed a "legitimate question of liability" of the defendant, the plaintiff did not have to post a bond.[122] The court used the rational basis test to uphold the statute on the grounds that the legislature could have determined that requiring a bond would discourage frivolous medical malpractice claims.[123] The court approved the statute's burden on plaintiffs because the legislature could reasonably have determin-

112. *Id.* at 320, 343 N.E.2d at 837.
113. *See supra* note 95.
114. 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981); *see infra* notes 62-66 and accompanying text.
115. *Id.* at 492, 424 N.E.2d at 592.
116. *Id.*
117. *Id.* at 492, 424 N.E.2d at 592.
118. OHIO REV. CODE ANN. § 2711.21 (Page 1981).
119. Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 497, 424 N.E.2d 586, 595 (1981).
120. 383 Mass. 645, 369 N.E.2d 985 (1977); *see supra* notes 42-44 and accompanying text.
121. MASS. ANN. LAWS ch. 231, § 60B (Michie/Law. Co-op. Supp. 1985).
122. Paro v. Longwood Hosp., 383 Mass. 645, 648, 369 N.E.2d 985, 987 (1977).
123. *Id.* at 651, 369 N.E.2d at 989.

ed that plaintiffs are responsible for most frivolous malpractice litigation.[124]

The equal protection assault in medical malpractice claims is not limited to cases in this Note. Virtually every state passed one or more statutory provisions in response to the medical malpractice crisis of the mid-1970s. The legislatures of nearly thirty states have enacted statutes establishing mandatory arbitration or mediation panels.[125]

The legislative purpose behind mandatory mediation and arbitration panels is to reduce the cost of medical care by reducing the cost of malpractice insurance and encouraging settlement of malpractice claims.[126] Many courts have accepted this goal as a valid legislative purpose, and are extremely reluctant to set aside a legislative enactment "if any state of facts may reasonably be conceived to justify it."[127] An overwhelming majority of courts have rejected the challenge that mandatory mediation or arbitration statutes improperly single out medical malpractice litigants for unique treatment.[128] Only three state supreme courts have reached a different conclusion.[129]

Until more data is available to determine if the malpractice panels are indeed serving their legislative purpose, their required use should withstand an equal protection challenge.

V. CONTINUED VIABILITY

Much litigation has occurred concerning the constitutionality of medical malpractice arbitration and mediation panels. During the medical malpractice crisis and the peak period of legislative response[130] to this crisis, the courts closely scrutinized the

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124. *Id.*

125. *See* Note, *supra* note 4.

126. *See generally* Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682 (1982).

127. McGowan v. Maryland, 366 U.S. 420, 426 (1961); *see also* Beatty v. Akron City Hosp., 67 Ohio St. 2d 483, 493, 424 N.E.2d 586, 592 (1981) (quoting Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). ("Ordinarily, under the rational basis requirement, any classification based 'upon a state of facts that reasonably can be conceived to constitute a distinction, or differences, in state policy . . .' will be upheld.")

128. The courts in 23 states and three federal circuits have rejected equal protection challenges in this setting. For a listing of these courts, see American Bank and Trust Co. v. Community Hosp., 36 Cal. 3d 359, 370 n.10, 683 P.2d 670, 677 n.10, 204 Cal. Rptr. 671, 678 n.10 (1984).

129. Carson v. Maurer, 120 N.H. 925, 930-31, 424 A.2d 825, 830-31 (1980) (substantial relationship test); Arneson v. Olsen, 270 N.W.2d 125, 133 (N.D. 1978) (substantial relationship test); Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983) (rational basis test).

130. The peak period of legislative enactment of statutes dealing with the medical malpractice crisis was 1975-1977.

medical malpractice statutes and often found them to be unconstitutional.[131] This trend has given way to a shift toward legislative deference.[132]

As more data becomes available regarding the performance of these panels, a constitutional attack may again threaten their viability. The Pennsylvania[133] and Florida[134] cases illustrate the practical problems inherent in panel procedures, and may reflect a different focus that other courts will soon adopt.

In *Mattos v. Thompson*,[135] the Pennsylvania Supreme Court ruled that the state's arbitration statute was unconstitutional after evaluating the accomplishments of the panel system.[136] The court stated that "sufficient time ha[d] passed to allow for a meaningful evaluation . . ."[137] and concluded that the lengthy delay occasioned by the arbitration system created a burden laced with "onerous conditions, restrictions [and] regulations."[138] The court's finding demonstrated the statutory scheme's inability to provide an effective dispute resolution forum in the medical malpractice area.[139]

A statistical analysis that reflected the panels' lack of success influenced the *Mattos*[140] court's decision. The statistics revealed that as of May 31, 1980, 3,452 cases were filed, but only 936 (27%) were resolved or terminated. In fact, only six of forty-eight cases originally filed four years earlier remained unresolved.[141] The *Mattos* court declared that "[s]uch delays are unconscionable and irreparably rip the fabric of public confidence . . . of our judicial system."[142]

Pennsylvania's arbitration panel had received poor reviews even before the *Mattos* decision. The Third Circuit in *Edelson v. Soricelli*[143] described the Pennsylvania Act as "a system that,

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131. *See, e.g.*, Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Cty. Ct. C.P. 1976).

132. *See, e.g.*, Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Wisconsin *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

133. Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).

134. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980).

135. 491 Pa. 385, 421 A.2d 190 (1980).

136. The compulsory arbitration provisions of the Pennsylvania Health Care Services Malpractice Act became effective October 15, 1975. *See* Parker v. Children's Hosp., 483 Pa. 106, 113, 394 A.2d 932, 935 (1978); PA. STAT. ANN. tit. 40, §§ 1301.101-.1006 (Purdon Supp. 1985).

137. Mattos v. Thompson, 491 Pa. 385, 395, 421 A.2d 190, 195 (1980).

138. *Id.*

139. *Id.* at 397, 421 A.2d at 196.

140. *Id.* at 396, 421 A.2d at 195.

141. *Id.*

142. *Id.*

143. 610 F.2d 131 (3d Cir. 1979).

though theoretically sound, is actually a resounding flop."[144] The court said that it would be futile for the plaintiff to "resort to a state . . . procedure that has proven to be ineffective, inefficient, and incapable of operation under the . . . statute."[145]

The Florida Supreme Court had an opportunity to reevaluate its malpractice mediation system four months prior to *Mattos*. In *Aldana v. Holub*,[146] the court found that the act violated concepts of due process because the statute proved arbitrary and capricious in operation.[147] Although the *Aldana* court did not overturn its earlier decision upholding the facial validity of the act,[148] the court had authority to render the practical operation of the statute unconstitutional.[149] The court painstakingly examined more than seventy medical mediation claims, and concluded that the Medical Mediation Act was unconstitutional in its entirety because of its arbitrary and capricious operation.[150]

It is difficult to evaluate the success of many of the mediation panels because of insufficient information. The Florida and Pennsylvania decisions may become the rule rather than the exception should other states decide to evaluate whether the establishment and use of their panels does in fact meet intended legislative goals.

IV. CONCLUSION

The public has a strong interest in encouraging and facilitating settlement of malpractice claims. In theory, use of mediation and arbitration panels is a reasonable means to accomplish this goal. But as Florida and Pennsylvania have demonstrated, such panels may not achieve the desired legislative objectives.

Whether the constitutionality of the mediation procedure is evaluated in a challenge based on the right to trial by jury or the equal protection guarantee is immaterial. The pressing question is whether the panels are doing what they were enacted to do. However, most courts adhere to the principal that constitutionali-

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144. *Id.* at 136.
145. *Id.*
146. 381 So. 2d 231 (Fla. 1980).
147. *Id.* at 238.
148. Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976). The *Aldana* court emphasized that its decision was not "premised on a reevaluation of the wisdom of the *Carter* decision. Rather, it is based on the unfortunate fact that the medical mediation statute has proven unworkable and inequitable in practical operation." Aldana v. Holub, 381 So. 2d 231, 237 (Fla. 1980).
149. *Id.*
150. *Id.* at 236.

ty does not depend on a court's assessment of the success or failure of the statute's provisions.[151]

This Note is not intended to render a judgment on the constitutionality of mediation and arbitration panels. Instead, it focuses on difficulties inherent with panel procedures. This Note does not address policy considerations underlying enactment of mandatory dispute panels. At the time of the perceived malpractice crisis in the mid-1970s, state legislatures responded too quickly. The result was a superficial examination of whether such a crisis actually existed. At present, the legislation enacted is not dealing with a crisis, whether manufactured or real.

The cost of medical care continues to rise despite legislation and reductions in malpractice insurance premiums. According to a California Hospital Association study of 65% of the state's hospitals, the cost of malpractice insurance steadily increased prior to enactment of MICRA in 1975.[152] Such costs steadily decreased thereafter until 1981 when the cost for $1,000,000 of insurance coverage was 25% less than the 1975 level.[153]

Between 1975 and 1981, the average daily charge for hospitalization in a California community hospital increased from $217 to $547 per day.[154] These statistics are important because hospital expenditures constitute more than 40% of the total expenditures for medical care, more than any other component of overall medical costs.[155] Thus, medical costs continue to rise despite the existence of both malpractice legislation and declines in insurance premiums.

Enacted medical malpractice legislation indicates not only the strength of the medical and insurance lobbies, but also the historic vulnerability of legislatures to do something when faced with a

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151. *See, e.g.*, American Bank and Trust Co. v. Community Hosp., 36 Cal. 3d 359, 372, 683 P.2d 670, 679, 204 Cal. Rptr. 671, 681 (1984) ("whether *in fact* the Act will promote [the legislative objectives] is not the question: the Equal Protection Clause is satisfied by our conclusion that the [state] Legislature *could rationally have decided* that [it] . . . might [do so] . . . .") (quoting Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 466 (1981)), *reh'g denied*, 450 U.S. 1027 (emphasis in original).

152. *See supra* note 83.

153. *See* Brief for Amicus Curae, California Hospital Association, American Bank and Trust Co. v. Community Hosp., 660 P.2d 829, 840, 190 Cal. Rptr. 371, 382 (1983).

154. American Bank and Trust Co. v. Community Hosp., 660 P.2d 829, 840, 190 Cal. Rptr. 371, 382 (1983) (citing U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 111 (1981) and CAL. HEALTH FACIL. COM., QUARTERLY FIN. & UTILIZATION REP. NO. 82-5, AGGREGATE HOSPITAL DATA 4 (Apr. 15, 1982)).

155. American Bank and Trust Co. v. Community Hosp., 660 P.2d 829, 840, at 190 Cal. Rptr. 371, 382 (1983) (citing U.S. DEPT OF HEALTH & HUMAN SERVICES, PUBLIC HEALTH SERVICE, OFFICE OF HEALTH RESEARCH, STATISTICS AND TECHNOLOGY 203).

perceived pressing problem. Constitutional challenges to the legislation have met with only limited success. However, if Pennsylvania and Florida indicate a new trend, the continued viability of these malpractice panels, as they presently operate, may experience a renewed attack.